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No. 167.

Supreme Court of the United States.

THE MIDDLETOWN NATIONAL BANK OF MIDDLETOWN, CONNECTICUT,

Complainant-Appellant,

against

THE TOLEDO, ANN ARBOR AND NORTH MICHIGAN RAILWAY COMPANY *et al.*; CHARLES I. HUDSON *et al.*,

Defendants-Respondents.

Brief of Defendant-Respondent Hudson.

JOSEPH FETTRETCH,
Solicitor for Defendant, Charles I. Hudson.

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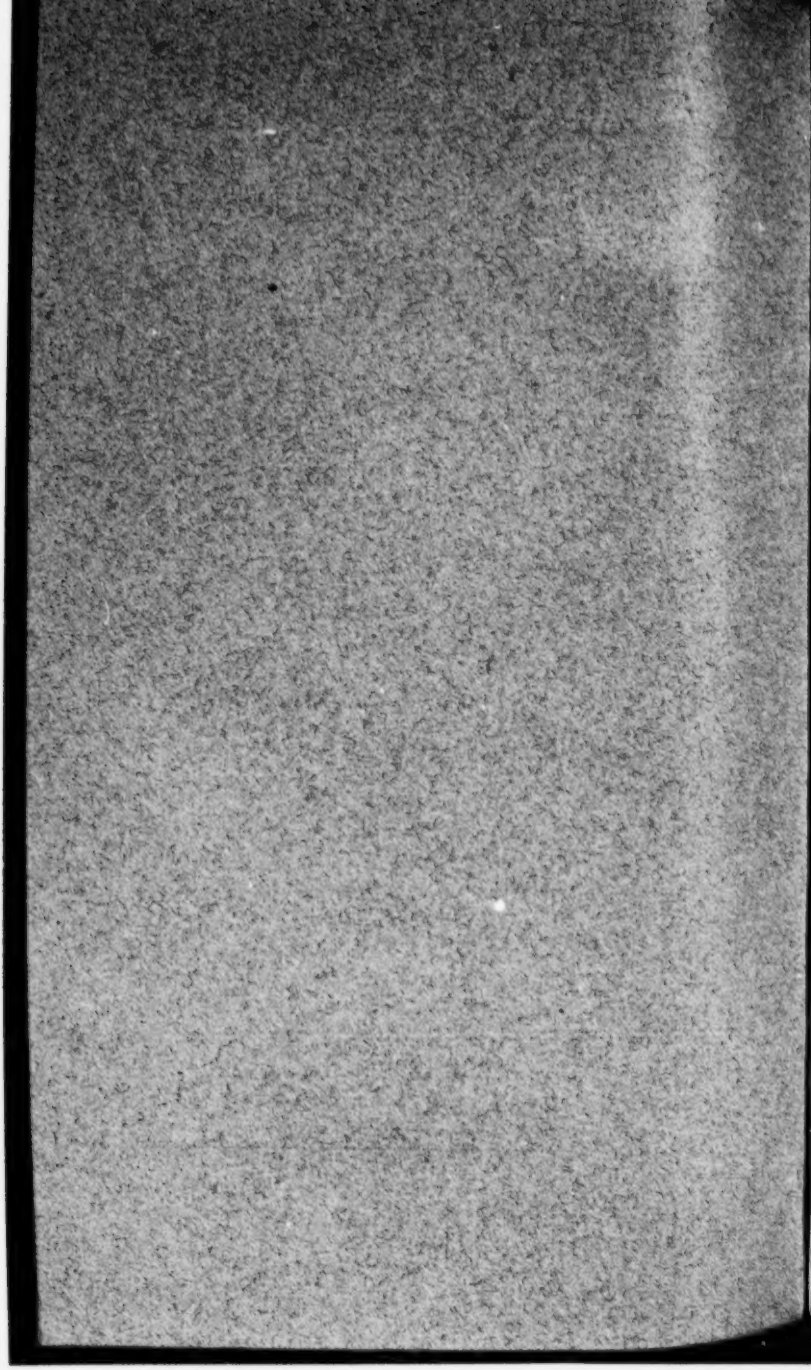

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TOLEDO, ANN ARBOR AND NORTH MICHIGAN RAILWAY COMPANY, *et al.*,

Defendants-Appellees.

Brief of Charles I. Hudson, Appellee.

This cause comes before this Court upon the certificate of the Judges of the United States Circuit Court of Appeals, Second District, submitting two questions of law, as follows:

> "*First.*—Whether Article XIII, Section 3, " of the Constitution of Ohio, is so far self- " executing that it may be enforced outside of " the jurisdiction of the said State without " compliance with the said requirements of " Section 3260 of the Revised Statutes of said " State as amended in 1894."
>
> "*Second.*—Whether Article XIII, Section " 3, of the Constitution of Ohio, is so far " self-executing that it may be enforced out " side of the jurisdiction of the said State " without compliance with the said require- " ments of Section 3260 of the Revised " Statutes of said State as amended in 1900."

See page 4 of Record.

The appeal to the United States Circuit Court of Appeals, Second District, was from a decree of the United States Circuit Court for the Southern District of New York, sustaining demurrers to the second amended bill of complaint dismissing the said bill.

The complainant, a creditor of the Railway Company, defendant, a corporation of the State of Ohio, having recovered a judgment in the Supreme Court of the State of New York, upon which execution was issued and returned unsatisfied, brought its bill in equity for the benefit of itself and other creditors against numerous stockholders of the Railway Company, defendant, resident in the district, to enforce the liability of such stockholders for debts of such company under the laws of Ohio, making such company also a party defendant.

Upon demurrers the Court below held that the bill must be dismissed, because some stockholders were not made parties, taking the view that the suit must be regarded as a suit such as is provided for by the statutes of Ohio relating to such liability, and that such statutes required all stockholders to be made parties.

The appellee, Charles I. Hudson, submits that the following propositions should be held to be law, viz.:

First.—That Article XIII, Section 3, of the Constitution of Ohio, is not so far self executing that it may be enforced outside of the jurisdiction of the State of Ohio without compliance with the requirements of Section 3260 of the Revised Statutes of Ohio, as amended in 1894 and 1900.

Second.—That had no such legislation been had in Ohio there would have been no liability under said constitutional provision, which could have been enforced anywhere.

Third.—That to give any force to such constitutional provision and impose any liability, it was intended that legislative action should be taken, providing for the imposition and enforcement of the liability authorized by such provision.

Fourth.—That the Legislature of Ohio, having carried out the will of the framers of the Constitution, and provided for the form and the extent of the liability, and declared the method of its enforcement, that method is exclusive and must be pursued.

Fifth.—That it not being claimed that the method prescribed by the Ohio statutes, as amended in 1894 or 1900, has been pursued, the demurrers were rightly sustained and the judgment dismissing the second amended complaint properly entered; and the United States Circuit Court of Appeals—Second Circuit—should affirm such judgment.

Argument.

The provision of the Ohio Constitution now under examination was passed in 1851, and reads as follows:

> "Dues from corporations shall be secured by such individual liability of the stockholders, and other means, as may be prescribed by law; but in all cases each stockholder shall be liable over and above the stock by him or her owned, and any amount unpaid thereon, to a further sum, at least equal in amount to such stock."

The appellee, Hudson, submits that this is nothing more than saying that stockholders in corporations shall be liable to creditors in such manner as the Legislature shall prescribe, but prohibiting the Legislature, when carrying out such direction, from prescribing a less ultimate liability than the amount,

if any, unpaid on the stock owned by a stockholder, and an amount equal to the par value of the stock.

If the words, "Dues from corporations shall be secured by such individual liability of the stockholders, and other means, as may be prescribed by law," comprised the whole constitutional provision before the Court, there would and could be no possible question but that the provisions would not be self executing, and that further legislation would be required to prescribe the liability and the method of its enforcement.

The appellant's counsel submits that the rest of the provision does not give the self-executing force which would sustain the bill of complaint, it being merely a mandate to the Legislature to provide a way to enforce such constitutional provision and authorizing it to add any additional security to the creditor of the corporation it might see fit, but saying, whatever you do legislate, you must at least provide for a liability of at least a sum equal to the par value of the stock, which additional liability will be in addition to any unpaid amount on the stock itself.

Reading the constitutional provision this way does not require any strained construction of language and does justice to all.

The Legislature of Ohio seems to have taken this view of their duty under this constitutional provision, for they apparently at once proceeded to adopt statutory provisions concerning the liability and providing the method of enforcement.

See Sec. 78 Act of May 1, 1852, Vol. 50 Ohio Laws, p. 296.

See Act of March 11, 1853, Vol. 51 p. 386.

See Act of April 1, 1854, Vol. 52, p. 44.

Provisions appear in this behalf in the Revised Statutes of 1880, and Section 3258 thereof is as follows:

> "The stockholders of a corporation which may be hereafter formed, and such stockholders as are now liable under former statutes, shall be deemed and held liable, in addition to their stock, in an amount equal to the stock by them subscribed, or otherwise acquired, to the creditors of the corporation to secure the payment of the debts and liabilities of the corporation."

Section 3260 of the Revised Statutes of 1880 provides as follows:

> "A stockholder or creditor may enforce such liability by action, jointly, against all the holders or owners of stock, which action shall be for the benefit of all the creditors of the corporation and against all persons liable as stockholders; and in such action there shall be found and determined the amount payable by each person liable as stockholder on all the indebtedness of the corporation, in which adjudication no costs shall be taxed to nor collected of any stockholder to an amount which, together with the amount to be paid on said indebtedness will exceed the amount of the stock on which he is liable."

In 1894 this section was amended by adding a provision for the *pro rata* distribution of the liability in case of inability to summon stockholders, and a provision for the enforcement of the stockholders' liability, by a judgment creditor, only after such an action to enforce the stockholders' liability has been prosecuted to final decree.

After this action was begun, and in 1900, but before the filing of the second amended bill of complaint (the one now before the Court), Section 3260 was amended so as to read as follows:

> "Section 3260. Whenever any creditor of a corporation seeks to charge the directors, trustees or other superintending officers of a corporation, or the stockholders thereof, on account of any liability created by law, he may file his complaint for that purpose in any Common Pleas Court which possesses jurisdiction to enforce such liability.

Section 3260 (*a*). The Court shall proceed thereon, as in other cases, and, when necessary, shall cause an account to be taken of the property and obligations due to and from such corporation, and may appoint one or more receivers.

Section 3260 (*b*). If, on the coming in of the answer or upon the taking of such account, it appears that such corporation is insolvent, and has not sufficient property or effects to satisfy such creditor, the Court may proceed to ascertain the respective liability of the directors, officers and stockholders, and enforce the same by its judgment, as in other cases.

Section 3260 (*c*). In all cases in which the directors or other officers of a corporation, or the stockholders thereof, are made parties to an action in which a judgment is rendered, if the property of such corporation is insufficient to discharge its debts, the Court shall give notice to non-resident stockholders, as provided in Sections 5048, 5049, 5050, 5051, or 5052 of the Revised Statutes, and shall first proceed to compel each stockholder to pay in the amount due and remaining unpaid on the shares of stock held by him, or so much thereof, as is necessary to satisfy the debts of the company.

Section 3260 (*d*). If the debts of the company remain unsatisfied, the Court shall proceed to ascertain the respective liabilities of the directors or other officers, and of the stockholders, and to adjudge the amount payable by each, and enforce the judgment, as in other cases. The Court may authorize and direct the receivers to prosecute such action in his own name as receiver, as may be necessary in other jurisdictions to collect the amount found due from any officer or stockholder.

Section 3260 (*e*). Whenever any action is brought against any corporation, its directors, or other superintending officers, or stockholders, according to the provisions of this chapter, the Court, whenever it appears necessary or proper, may order notice to be published in such manner as it shall direct,

requiring all creditors of such corporation to exhibit their claims and become parties to the action, within a reasonable time, not less than six months from the first publication of such order, and, in default thereof, to be precluded from all benefit of the judgment which shall be rendered in such action, and from any distribution which shall be made under such judgment.

Section 3260 (*f*). Upon a final judgment in any such action against an insolvent corporation, the Court shall cause a just and fair distribution of the property and assets of such corporation, or the proceeds thereof, to be made among its creditors.

Section II.—That said Section 3260 be, and hereby is, repealed.

Section III.—This act shall apply to pending actions and shall take effect and be in force from and after its passage."

It thus clearly appears, from the foregoing extracts of the Ohio statutes, that the Legislature carried out the constitutional mandate and made full provision for imposing and enforcing the liability.

Again, the courts of Ohio evidently have acted upon the theory that additional legislation was necessary, for no case will be found in Ohio where an attempt has been made to enforce a claim of liability under the constitutional provision alone, but in every instance it will be found that the constitutional provision and the legislative acts following the same and relating thereto were the basis of claims for liability.

Again, in several of the States where the same, or substantially the same constitutional provision formed part of the law of the State, it has been held that such provisions were not self-executing, and that they did require legislation to determine the liability and the method of its enforcement.

In Woodworth against Bowles, 61 Kans., 569, the action was brought to enforce the payments of

amounts due by stockholders under their statutory liability.

The constitutional provision before the Court in the Woodworth case was:

> "Dues from corporations shall be secur d by individual liability of the stockholders to an additional amount equal to the stock owned by each stockholder, and such other means as shall be provided by law."

Legislative provisions for the enforcement of this constitutional enactment were adopted by the Legislature of Kansas.

In the Woodworth case the questions before the Supreme Court of Kansas were the same as those now before this Court, and the Court held that the provision of the Constitution was not self-executing and required legislative enactment for its enforcement, and the Court also held that the Legislature of Kansas having provided for the enforcement of the constitutional provision, the remedy provided by the Legislature was exclusive.

The Court, in Woodworth case, after discussing the question of the self-executing force of the constitutional provision, said (page 574):

> "But we are constrained to hold that the constitutional provision in question is not self-operative. It does not execute its own commands and can only be regarded as a direction to the Legislature. As a rule, constitutional provisions, unless expressed in negative form or possessed of a negative meaning, are not self-assertive. They usually assume the form of a command to the Legislature, and legislative action becomes necessary to give them effect. The one under consideration is an instance of the latter kind. The Constitution does not ordain in terms of the present tense the individual liability of stockholders for the debts of corporations, but it ordains it in terms of the future tense. It declares that 'dues from corporations shall be secured,' etc., not that 'dues from corporations are secured.' When

> the Constitution declares that a right shall be secured, or a thing shall be done, it means that it shall be secured or shall be done by the Legislature. In such case the Constitution places upon the Legislature the obligation to carry out its ordinances by appropriate enactment."

Continuing, in Woodworth case (page 575), the Court said:

> "The courts of our own State have never been called upon to examine our own constitutional provision with a view to determining the question involved. It has been, however, given consideration by the courts of some of the other States, and also by the Federal courts. Suits have been instituted in the courts of other States against citizens of such States owning stock in corporations of this State to recover upon the liability declared by the laws of this State."

In Tuttle *v.* Nat. Bank of the Republic, 161 Ill., 497, 44 N. E., 984, the majority of the Court ruled,

> "The provision of the Kansas Constitution that 'dues from corporations shall be secured by individual liability of stockholders to an additional amount equal to the stock owned by each stockholder, and such other means as shall be provided by law,' is not self executing, it appearing from the provision itself that legislation is contemplated as necessary for its enforcement."

In Marshall *v.* Sherman, 148 N. Y., 9, 42 N. E. 419, it was held:

> "The provision of the Constitution of the State of Kansas that 'dues from corporations shall be secured by individual liability of the stockholders to an additional amount equal to the stock owned by such stockholders, and such other means as shall be provided by law,' is not self-executing, and of itself creates no liability, but contemplates legislation to make it effectual; and when statutes to that end have been

enacted, and an action is brought to enforce the individual liability of a stockholder by a complaint which sets forth both the constitution and the statutes, the action is to be deemed one to enforce the statutes and not the constitution."

In Morley *v.* Thayer, 3 Fed., 737, it was said:

"Section 2, Article 12, of the Constitution of the State of Massachusetts, provides that dues from corporations shall be secured by individual liability of the stockholders to an additional amount equal to the stock owned by each stockholder, and such other means as shall be provided by law.

"Held, that suit could not be maintained by virtue of this constitutional provision, without reference to the statutes of the State passed in fulfillment of the constitutional mandate."

NOTE.—It appears that in the Thayer case it was not a statute of Massachusetts that was referred to, but a statute of Kansas.

In Woodworth case the Court also said (page 576):

"Having seen that the constitutional provision that 'dues from corporations shall be secured by the individual liability of their stockholders' is not self-operative, but little more, it would seem, need to be said. Inasmuch as the Constitution did not secure an equality of right to creditors of corporations, the statute alone must be allowed to determine the rules of right prevailing among them."

To the same effect is Mechanics' Savings Bank *v.* Fidelity Insurance Trust Company, 87 Fed. Rep.

In State Bank against Sayward, 86 Fed Rep., 45, the Circuit Court of the United States for the District of Massachusetts sustained a demurrer in an action brought by a creditor of an Ohio corporation upon the following grounds: First, because the Circuit Court in Massachusetts held that a "bill in equity

cannot be maintained by a creditor to enforce the liability of a stockholder in a corporation organized under the laws of another State," and, second, "that the Ohio corporation is a necessary party."

It cites for its authority the language of Chief Justice Field in Post against Railroad Company, 144 Mass., 345, where the Justice said:

> "This Court does not take the jurisdiction of a suit to enforce this liability of stockholders in a foreign corporation, not because it would be a suit to enforce a penalty, or a suit opposed to the policy of our laws, but because it is a suit against a foreign corporation, which involves the relation between it and its stockholders, and in which complete justice only can be done by the courts of the jurisdiction where the corporation was created. * * * If an assessment is to be laid upon the members or stockholders, or a contribution enforced from them, according to the law of the State under which the corporation is created, the courts of that State alone can afford complete and effectual judicial relief."

The State Bank *v.* Sayward was affirmed by the United States Circuit Court of Appeals for the First Circuit, in January, 1899, and is reported in 91 Fed. Rep., 443.

The Court, after quoting the constitutional provision and the statute creating the liability as it appeared in the Revised Statutes of 1880, and after referring to the decision of the Ohio Supreme Court in Umstead *v.* Buskirk, 17 Ohio State, 114, and Wright *v.* McCormick, 17 Ohio State, 87-95, and Wheeler *v.* Faurot, 37 Ohio State, 26-28, held that the Ohio statute providing that

> "the constitutional liability of stockholders of a corporation may be enforced by an action which shall be for the benefit of all the creditors and against all the stockholders, and that in such action there shall be determined the amount payable by each stockholder on all the indebtedness of the corporation;" and further held that "where the contemplated

> statutory ascertainments had not been made, the liability would not be enforced by a Federal Court in a sister State in a suit by a single creditor in which neither all the stockholders nor the corporation were made parties."

In Fourth National Bank *v.* Francklyn, 120 U. S., 747, the action was brought in the Circuit Court of the U. S. for the Southern District of New York, and was brought to enforce a liability of a R. I. corporation against a stockholder.

The provisions of the R. I. statute was as follows:

> "Sec. 1. No person shall hereafter be imprisoned, or be continued in prison, nor shall the property of any such person be attached, upon an execution issued upon a judgment obtained against a corporation of which such a person is or was a stockholder.
>
> "Sec. 2. All proceedings to enforce the liability of a stockholder for the debts of a corporation shall be either by suit in equity, conducted according to the practice and course of equity, or by an action of debt upon the judgment obtained against such corporation; and in any such suit or action such stockholder may contest the validity of the claim upon which the judgment against such corporation was obtained, upon any ground upon which such corporation could have contested the same in the action in which judgment was recovered.
>
> "Sec. 3. All acts and parts of acts inconsistent herewith are hereby repealed.
>
> "Sec. 4. This act shall take effect from and after the date of the passage thereof."

This Court, after referring to many cases on the subject, said (page 758):

> "In all the diversity of opinion in the courts of the different States upon the question of how far a liability, imposed upon stockholders in a corporation by the law of the State which creates it, can be pursued in

a court held beyond the limits of that State, no case has been found in which such a liability has been enforced by any court without a compliance with the conditions applicable to it under the legislative acts and judicial decisions of the State which creates the corporation and imposes the liability. To hold that it could be enforced without such compliance would be to subject stockholders residing out of the State to a greater burden than domestic stockholders.

"The provision of the Rhode Island statutes, which made the stockholders of the Atlantic DeLaine Company liable for its debts, was coupled with provisions prescribing the form of remedy, which still remain in force, except so far as they have been modified by the later statute of the same State. By the decisions of this Court, as well as by those of the courts, both State and Federal, held within the State and District of Rhode Island, and of the highest court of Massachusetts, where these provisions had their origin and their first judicial construction, this liability can be enforced only in the mode prescribed by the statutes of Rhode Island. The present suit, therefore, not being a bill in equity, or an action upon a judgment against a corporation, which are the only forms of remedy authorized by these statutes, but being an independent action at law upon the original liability of the stockholder, cannot be maintained, and the Circuit Court rightly so held."

The appellee, Hudson, submits that the case of Whitman *v.* Oxford National Bank, 176 U. S., 559, should not be held to be an authority for the plaintiff and appellant in this case, the constitutional provisions not being the same.

THE KANSAS PROVISION IS AS FOLLOWS:	THE PROVISION IN OHIO IS AS FOLLOWS:
"The dues from corporations shall be secured by individual liability of the stockholders to an additional amount equal to the stock owned by each holder; and such other means as shall be provided by law."	"Dues from corporations shall be secured by such individual liability of the stockholders, and other means as may be prescribed by law; but in all cases each stockholder shall be liable over and above the stock by him or her owned, and any amount unpaid thereon, at least equal in amount to such stock."

In the Kansas statute one liability was fixed in and by the constitutional provision, and this Court could (as it did in the Whitman case), very properly hold that that part of the provision was self-executing and enforcible in any court in any State.

In the Ohio statute now under consideration, no such liability could be enforced until the Legislature prescribed the liability, the method and manner of enforcement.

The language of the provision in this behalf, namely, "dues from corporations shall be secured by *such* individual liability of the stockholders and other means as may be prescribed by law," is clear.

Again, the construction put on the Kansas constitution in the Whitman case should not be applied to the Ohio constitutional provision, for, as already shown, the relation of these words in the Ohio case to the other parts of the provisions are entirely different from the relation of the same words in the Kansas provision, and the same construction does not follow and should not be put thereon.

Again, in the Whitman case, the Court declared in the Kansas case (page 562) that—

> "A failure of the Legislature to create courts or prescribe modes of procedure may,

> it is true, make ineffective this constitutional provision, but does not destroy the liability; nor is it created by the act of the Legislature prescribing the mode of its enforcement," and then (page 563) continuing, says: "But this constitutional provision does not stand alone. The Legislature of Kansas has acted on the subject-matter, and the constitution and the statutes are to be taken together, as making one body of law; and it serves no good purpose to inquire what rights and remedies a creditor of a corporation might have or what liabilities would rest upon a stockholder if either constitution or statutes stood alone and unaided by the other."

From this language it may very well be inferred that the Court meant to say that where the constitutional provision stood alone it might be self executing, but where the Legislature had, by virtue of the constitutional provision, provided ways and means for the enforcement of such liability, both must be construed together, and that the remedy provided by the statute subsequent to the constitutional provision or in aid thereof, must be pursued in order to impose the liability upon the stockholder.

In Ward *v.* Joslin, 186 U. S., 142, the Court said (page 150):

> "In Woodworth *v.* Bowles, 61 Kas., 569, it was held that the 'constitutional provision was not self-executing but required legislative action to give it effect,"

The Court apparently in the Ward case adopted the Kansas view. By thus adopting the decision of the Supreme Court of Kansas the decision of this Court in Whitman case, 176 U. S., 559, need no longer be considered of binding effect in construing a similar provision in the constitution of another State.

Indeed, it is to be believed, that had this Court's opinion in the Whitman case been delivered a few

days later than it was, it would have held that the constitutional provision of Kansas, under discussion in the Whitman case, was not self executing; for, as counsel understands it, the rule, as announced in this Court, is that where the highest court of a State has construed the constitutional provision of the State, the Supreme Court of the United States will follow the construction given by the said Court.

In Whitman case the decision of the United States Supreme Court was delivered March 5th, 1900, and five days later, *i. e.*, on the 10th of March, 1900, the Supreme Court of Kansas handed down its opinion that the constitutional provision was not self-executing.

The appellee submits that the case of the Hancock National Bank *v.* Farnum, 176 U. S., 640, should no longer be an authority in the matter of the Kansas constitutional provision, in view of the decision in the Woodworth case, and the reference thereto in Ward *v.* Joslin, 186 U. S., 142 and 150.

In the case of Flash *v.* Conn, 109 U. S., 371, the statute under construction was the New York statute, which differs radically in every respect from the constitutional provision of Ohio, now before the Court.

The provision under consideration in the Flash case was:

> "Sec. 10. All the stockholders of every company incorporated under this act shall be severally individually liable to the creditors of the company in which they are stockholders, to an amount equal to the amount of stock held by them respectively for all debts and contracts made by such company, until the whole amount of capital stock fixed and limited by such company shall have been paid in, and a certificate thereof shall have been made and recorded as prescribed in the following section."

Appellees' counsel submits that the Flash case has no real bearing upon the case now before the

Court, and that this appears conclusively from the language of the Court (pages 380–1), where the Court said:

> "But in this case the statute makes every stockholder individually liable for the debts of the company for an amount equal to the amount of his stock. This liability is fixed, and does not depend upon the liability of other stockholders. There is no necessity for bringing in other stockholders or creditors. Any creditor who has recovered judgment against the company, and sued out an execution thereon, which has been returned unsatisfied, may sue any stockholder, and no other creditor can." Evidently this Court held, as it did in Flash case because "Such actions are maintained without objection in the courts of New York, under Section 10 of the statute relied on in this case. Shillington *v.* Howland, 53 N.Y., 371; Weeks *v.* Suydam, 64 N. Y., 173; Handy *v.* Draper, 89 N. Y., 334; Rocky Mountain Nat. Bank *v.* Bliss, *Id.*, 339."

Appellees' counsel submits that Willis *v.* Mabon, 48 Minn., 140, frequently cited with approval, does not dispose of the question involved in this case.

In the Willis case the constitutional provision was as follows:

> "Each stockholder in any corporation (except those organized for the purpose of carrying on any kind of manufacturing or mechanical business) shall be liable to the amount of stock held or owned by him."

The liability was fixed by the very provision itself, nothing being left for the Legislature to do, so far as creation of the liability was concerned.

In the case at bar the plain reading of the provision shows that it was a direction to the Legislature to impose the liability and to provide means for its enforcement.

Again, in the Willis case, unless the provision was self-executing, there was no liability whatever, for,

as counsel gathers from the report of the case, no legislative action on the subject was had in Minnesota.

Again, in the Willis case, the Court expressly recognized that a constitutional provision like the one now here in question was not self executing, for, in referring to French *v.* Teschemaker, 24 Calif., 518, and in distinguishing it from the Willis case, the Court said (page 152):

> "Of all the cases cited by appellent, the one most relied on is that of French *v.* Teschemaker, 24 Cal., 518. The constitution of California provided, Section 32: 'Dues from corporations shall be secured by such individual liability of the incorporators and other means as may be prescribed by law.'
>
> "Section 36: 'Each stockholder of a corporation or joint stock association shall be individually and personally liable for his proportion of all its debts and liabilities.'
>
> "The Court held that Section Thirty-six (36) was not self-executing. But the decision was mainly based upon two considerations. The first was that while this section provided that each stockholder should be liable for his proportion of the corporate debts, yet it did not determine what the proportion should be, nor prescribe any rule by which it should be ascertained. The second was that Section Thirty six (36) was to be read in connection with Section Thirty-two (32), and was evidently addressed to the Legislature."

Then the Court, in the Willis case, added: "No such consideration exists here, and hence we do not think that case is in point."

> See French *v.* Teschemaker, 24 Cal., 518.

In Willis *v.* Mabon, the Court cited the following cases:

1. State *v.* Weston, 4 Neb., 218, where provisions fixed the salary of officers and provided that—

> "the auditor shall draw warrants of the State quarterly therefor" "which shall be paid out of any funds not otherwise appropriated."

This provision is clearly distinguishable from the one in the case at bar.

2. Thomas *v.* Owens, 4 Md., 189, where the Court was construing a provision of the Maryland Constitution in regard to the amount of salary to which certain State officers were entitled.

The provision, so far as pertinent hereto, was:

> "Who shall receive an annual sum of $2,500," and shall "serve for two years from the date of their legislation."

The real question in the case was whether the salary began at the time of the election or at the time of the qualification by taking oath.

3. Reynolds *v.* Taylor, 43 Ala., 410, which merely decided, so far as the case at bar is concerned, that if the salary of a public officer is fixed and the times of payment prescribed by law, no special annual appropriation is necessary to authorize the auditor to issue a warrant for its payment.

4. Miller *v.* Marx, 55 Ala., 322, related to homesteads, and the constitutional provision held to be self-executing was as follows:

> "Every homestead, not exceeding eighty acres," etc., "shall be exempted from sale on execution or any other process from a court for any debt contracted after the adoption of this constitution."

This statement alone shows that the Maryland case has no application to the case at bar.

5. People *v.* Hoge, 55 Cal., 612, construed a constitutional provision providing that—

> "Any city containing a population of more than one hundred thousand inhabitants may frame a charter for its own government," etc.

The Court properly held that this provision was self-executing, and that no legislation was required to give it effect.

In Kirtly *v.* Holmes, 107 Fed. Rep., 1, will be found a discussion of the Ohio constitutional provision. Mr. Justice Day, then sitting in the United States Circuit Court of Appeals, Sixth Circuit (said Justice now being of this Court), discussed the questions involved here. On page 7 he wrote:

> "The case actually under consideration comes to this: Can a contractual liability of a stockholder in an Ohio corporation, domiciled in a foreign jurisdiction, be enforced, where the proofs show an assessment in the State of the creation of the corporation upon domestic stockholders, to the full amount of the stockholders' liability, and the testimony discloses the insolvency of the corporation and indebtedness in excess of the stockholders' liability, and an assessment is sought of exactly the same character as was enforced in the original case?
>
> We think, in the light of principle and authority, this question must be answered in the affirmative. We find the obligation to be one arising upon contract, and its enforcement upon principles of comity, at least, in cases like the one under consideration, to work no injustice upon citizens of a foreign jurisdiction."

It is fair to assume, that had it appeared in the Kirtly case as it does in the case at bar, that there was not even an attempt to comply in any form with the Ohio statutes, the answer to the question in the Kirtly case would have been in the negative.

Evans *v.* Nellis, 187 U. S., 271, would seem to be an authority in favor of the contention that where, as in the case at bar, a statute of Ohio has made full provision for enforcing the stockholders' liability, however imposed (whether by constitutional provision alone, or by constitutional provision and legislative action combined), no suit could be maintained in any other jurisdiction to enforce the stockholders' liability, until all remedies have been exhausted in the Ohio courts.

In the Evans case the Court said (page 279), quoting from Waller *v.* Hamer, 69 Pac. Rep., 185:

> "This act provides a complete system for collecting the assets and paying the debts of an insolvent corporation, and adjusting the liability of the stockholders between themselves.
>
> To do this the receiver must bring in all stockholders that are within the jurisdiction of the Court. That in one proceeding the Court may ascertain and determine the indebtedness of the corporation, the amount each stockholder should pay, and if one has paid more than his proportion, award him such relief against the other stockholders as may appear just. The receiver having failed to comply with this plain statutory requirement, the demurrer to the plea in abatement should have been overruled."

and this Court answered the third question submitted to it in the Evans case "No." This question was: "Is the plaintiff, as Receiver appointed as aforesaid, entitled to maintain an action in the Circuit Court of the United States for the Northern District of New York?"

In Hale *v.* Allenson, 188 U. S., 56, the Court said:

> "The constitution of Minnesota, it will be seen, simply imposes a double liability upon the stockholders. The statutes of the State provide the only means of their enforcing that liability."

In Platt *v.* Wilmot, 193 U. S., 602, the Court said (pages 612-613):

> "The case of Whitman *v.* Oxford National Bank, 176 U. S., 559, is cited to show that the double liability of the stockholder under the Kansas constitution and statutes is of a contractual nature, and, therefore, not within Section 394, because it is not a liability created by common law or by statute. In the Whitman case it was held that this liability, though statutory in origin, was contractual in its nature; or, in other words, the stockholder, when he subscribed for or purchased his stock, entered into a contract authorized by statute. In that case it was also held that the constitutional provision did not stand alone, but that the Legislature of Kansas had also acted on the subject matter, and that the constitution and the statutes were to be taken together as making one body of law, and that, therefore, it would serve no good purpose to inquire what rights or remedies a creditor of a corporation might have or what liabilities would rest upon a stockholder if either constitution or statutes stood alone and unaided by the other.
>
> "We think, within the meaning of Section 394, this liability was created by statute, as it was by virtue of the statutes that the contractual liability arose. The language of the section plainly includes this case. It is a liability created by the statute, because the statute is the foundation for the implied contract arising from the purchase of or subscription for the stock, the contract being that the holder of the stock shall be liable in accordance with the terms of the statute."

In Cooley's Constitutional Limitations (7 Ed.), page 121, it is said:

> "A constitutional provision may be said to be self-executing if it supplies a sufficient rule by means of which the right given may be enjoyed and protected, or the duty imposed may be enforced; and it is not self-

executing when it merely indicates principles, without laying down rules by means of which those principles may be given the force of law. Thus, a constitution may very clearly require county and town government; but if it fails to indicate its range, and to provide proper machinery, it is not in this particular self-executing, and legislation is essential. Rights in such a case may lie dormant until statutes shall provide for them, though in so far as any distinct provision is made which by itself is capable of enforcement, it is law, and all supplementary legislation may be in harmony with it."

The appellee, Hudson, submits that in principle as well as by authority the propositions above stated by him are sustained, and the questions submitted should be answered in the negative and the matter remanded to the United States Circuit Court of Appeals to render judgment in conformity with such answers.

Dated January 20, 1905.

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